KUCHAI ESTATES SDN BHD & ORS v. PRESTIGE ALLOY SDN BHD

COURT OF APPEAL, PUTRAJAYA
DAVID WONG DAK WAH JCA
HAMID SULTAN ABU BACKER JCA
UMI KALTHUM ABDUL MAJID JCA
[CIVIL APPEAL NO: W-02(NCVC)(W)-1283-07-2016]
29 NOVEMBER 2019

CONTRACT: *Sale and purchase agreement – Specific performance – Dispute over purchase price and actual size of land – Whether purchaser acted in good faith in pursuance of sale and purchase agreement – Whether purchaser ready, able and willing to complete sale and purchase agreement – Whether vendor encumbered land with lienholder's caveat preventing purchaser from making balance purchase price – Whether there was a situation of fraud to justify lifting of corporate veil of vendor company – Whether vendor waived its rights to terminate sale and purchase agreement for fundamental breach of terms – Whether specific performance ought to be allowed*

CONTRACT: *Sale and purchase agreement – Termination – Counterclaim for termination of agreement – Failure of purchaser paying balance purchase price – Dispute over purchase price and actual size of land – Whether purchaser acted in good faith in pursuance of sale and purchase agreement – Whether purchaser ready, able and willing to complete sale and purchase agreement – Whether vendor encumbered land with lienholder's caveat preventing purchaser from making balance purchase price – Whether there was a situation of fraud to justify lifting of corporate veil of vendor company – Whether vendor waived its rights to terminate sale and purchase agreement for fundamental breach of terms – Whether vendor entitled to terminate sale and purchase agreement*

The respondent's ('plaintiff') claim against the appellants ('defendants'), amongst others, was essentially for specific performance of a sale and purchase agreement ('SPA') entered into between the plaintiff and the first defendant ('D1'). There was dispute over the purchase price of the land, being the subject matter of the SPA, as parties could not agree on the actual area/size of the land. Briefly, the facts were that the second defendant ('D2') and the third defendant ('D3') owned the entire shareholding of D1 and were the only directors of D1, a company, who was the registered owner of the said land. Pursuant to the SPA, the plaintiff agreed to purchase and D1 had agreed to sell the land at the agreed purchase price of RM5,948,857.53 or RM77 per sq ft ('purchase price'). The plaintiff contended that the size of the land as represented by the defendants was 7177.5 m^2. It was agreed between the parties that the purchase price shall be adjusted accordingly at RM77 per

A sq ft based on the actual area of the land. The plaintiff alleged that for the purpose of entering into the first supplementary agreement ('first SA') and the second supplementary agreement ('second SA'), D2 had represented to the plaintiff that after the government's land acquisition ('land acquisition'), the remaining area of the land was 6681.1822 m^2. Despite repeated requests B from the plaintiff for the purpose of the release of the balance purchase price, D1 failed to furnish any confirmation from the land office that the available area of the land after the land acquisition exercise was still 6681.1822 m^2 as represented and promised by D1/D2 under the first SA and the second SA. Subsequently, the plaintiff obtained confirmation from the land office that C the actual remaining area of the land after the land acquisition was only 2139.68 m^2. At all material times, the plaintiff was ready and willing to complete the SPA based on the adjusted purchase price of RM1,773,412.04 (based on RM77 x 23,031.3252 sq ft or equivalent to 2139.68 m^2) (adjusted purchase price). However, D1 refused to proceed with the SPA and insisted that the area of the land was 7177.5 m^2 without producing any document to D substantiate its position in the matter. Moreover, under cl. 10 of the SPA, it was the responsibility of D1 to remove all encumbrances on the land which was attributable to D1, which included the lienholder's caveat. The defendants, however, averred that the plaintiff had failed to perform its part of the SPA, had defaulted in the performance and completion of the SPA and E was not entitled to enforce the SPA. It was the defendants' submission that the plaintiff's claim should be dismissed. D1 essentially counterclaimed against the plaintiff for arrears of rental to the land as well as a declaration that the defendants were entitled to terminate the SPA, the first SA and the second SA. The High Court Judge ('HCJ'), amongst others, allowed the F plaintiffs' claim for specific performance of the SPA, and partially allowed D1's counterclaim for arrears of rental. The HCJ also found that D2 was the directing mind/alter ego of D1 and was solely responsible for the misrepresentation made to the plaintiff in respect of the area of the land and that justice of this case dictated that the corporate veil be lifted and for D2 G to be held accountable. The defendants thus appealed against the said decision. The issues that arose herein were (i) what was the actual area of the land; (ii) whether the trial court was justified in lifting the corporate veil; (iii) whether the trial court was correct in awarding damages to the plaintiff; and (iv) whether D1's counterclaim for declaration that it was entitled to terminate the SPA and the first and second SAs ought to be allowed.

H

Held (allowing appeal in part)
Per Umi Kalthum Abdul Majid JCA (for the majority):

(1) The land area, after deducting the area acquired by the government, was 7177.5 m^2 and not 2139.68 m^2. The HCJ erred in making the finding I of fact that the land area was 2139.68 m^2 merely by relying on the land office's letter dated 1 April 2014 as its maker was not called to testify,

thus rendering it inadmissible. The basis of the plaintiff's case was on the actual area the land fell. This area of the land was further confirmed by the final title of the land issued on 11 August 2017 which stated the area of the land concerned was 11719 m^2, and had an endorsement which stated that about 4541.50 m^2 were acquired. If the area acquired was subtracted from the total area of the land concerned, it would give rise to the balance of land area to be 7177.50 m^2 that was the actual land area purchased by the plaintiff. Thus, in view of the finding that the actual area of the land was 7177.50 m^2 and not 2139.68 m^2 as claimed by the plaintiff, the alleged damages so suffered by the plaintiff was not of the defendants' making but due to the insistence of the plaintiff on its own surmisation of the documents that it had misconstrued. As such, the plaintiff was not entitled to the damages awarded. (paras 51-54 & 61)

(2) The HCJ had unjustifiably lifted the corporate veil to find that D2 was the directing mind/alter ego of D1 and was therefore solely responsible for the misrepresentation made to the plaintiff. The plaintiff, in its statement of claim did not plead for the lifting of the corporate veil so as to find D2, let alone D3, personally liable. Neither did the plaintiff pray for the relief against D2 and D3 personally. Instead, the plaintiff pleaded that D1, D2 and D3 had conspired between themselves to injure the plaintiff by preventing and/or delaying the completion of the SPA by making representation and promises that the land area was at 6681.1822 m^2 despite knowing it was untrue and causing/allowing the land to be encumbered with the lienholder's caveat and refusing to redeem the land to ensure that the SPA could be completed. A party is bound by its pleadings and on that score alone, the plaintiff was precluded from seeking this relief. Further, the plaintiff had failed to prove that there was misrepresentation, or conspiracy or fraud by D2 and D3 on the plaintiff, and to lift the corporate veil when the law would only countenance it if fraud was established. D2, being the alter ego of D1 without more could not, in the circumstances, give rise to a situation of fraud, misrepresentation or conspiracy so as to justify the lifting of the corporate veil of D1 and to affix personal liability on D2 only.(paras 55 & 56)

(3) D1's counterclaim to terminate the SPA and the first and second SAs could not be allowed. The plaintiff had paid a certain amount of deposit for the purchase, which clearly showed the plaintiff's intention to complete the sale. Since both parties were under the misapprehension on the actual area of the land, the plaintiff could not be faulted for acting as it did on the premise that the land area was 6681.1822 m^2 and not 7177.50 m^2 and that the revised purchase price was 5,537,550.80 and not RM594.885.75. Hence, when the plaintiff paid the differential sum

of RM442,665.05 between the balance purchase price and the loan sum from the plaintiff's end financier to D1's solicitors to be held as stakeholders, the plaintiff in doing so was acting in good faith in pursuance of the provisions of the SPA read together with the first and second SAs. The plaintiff was at all material times ready, able and willing to complete the SPA. (para 62)

(4) By encumbering the land with the lienholder's caveat, D1 had acted against cl. 10 of the SPA, and had prevented the plaintiff from making the balance purchase price to D1 and accordingly registered itself as the owner of the land. D1 had not, at any time before the suit was filed, given notice to the plaintiff that they wanted to terminate the SPA for fundamental breach of contract on the part of the plaintiff for failure to make payment of the balance purchase price. Instead D1 had proceeded to take actions as if the parties were still contemplating the completion of the SPA and dealing with issues pertaining to the actual area of the land. Even if there was a fundamental breach of contract by the plaintiff (which this court did not find) D1 had waived its rights to terminate the SPA for fundamental breach of its terms and could not now counterclaim for a declaration that it was entitled to terminate the SPA. Further, the plaintiff had been paying rental for the land but had stopped paying from September 2014 until June 2015 and continuing by reason that the defendants had delayed completion of the SPA. By virtue of the tenancy agreement, the plaintiff was in physical possession of the land until now. (para 62)

Per Hamid Sultan Abu Backer JCA (dissenting):

(1) It is trite that specific performance will only be allowed if the purchaser had fulfilled the terms of his bargain with precision and at all times was willing, ready and able to do so even at the stage of appeal where the purchaser is a party. In this case, the area of land was in dispute and there was a mechanism to resolve that dispute in the sale and purchase agreement (SPA) itself. If the area was not in dispute, it would have been a straight forward case for the plaintiff to succeed on a claim for specific performance. At the appeal stage, the area of dispute was established by admitting fresh evidence by the defendant but the plaintiff had resisted to the appeal, thereby disentitling him to specific performance order. (para 72)

(2) There could not be any equitable consideration in favour of the plaintiff in the appellate stage. The facts would show by circuitous logic that the plaintiff was attempting by a judicial process to deprive the full entitlement of the defendant's right of the full purchase price as agreed in the SPA. Even at the appellate stage, the plaintiff was not able to concede to the area in dispute. It was clear that the land area was

7177.5 sq m and there could be an adjustment if it was found to be less or more. As such, specific performance being a discretionary and equitable relief ought not to be granted to the plaintiff. The plaintiff did not come to court with 'clean hands' at the trial stage as well and did not demonstrate 'clean hands' at the appellate stage. (para 76)

Case(s) referred to:

Ab Latef & Associates (M) Sdn Bhd v. Govindasamy Suppiah [2016] 10 CLJ 1 CA ***(refd)***
Associated Pan Malaysia Cement Sdn Bhd v. Westwood Development Sdn Bhd [2012] 2 CLJ 81 HC ***(refd)***
Associated Pan Malaysia Cement Sdn Bhd v. Westwood Development Sdn Bhd [2013] 10 CLJ 95 HC ***(refd)***
Formis Resources Bhd & Ors v. Risk Management and Safety System Pty Ltd & Ors and Other Appeals [2016] 9 CLJ 169 CA ***(refd)***
Gurbachan Singh Bagawan Singh & Ors v. Vellasamy Pennusamy & Other Appeals [2015] 1 CLJ 719 FC ***(refd)***
Jaafar Shaari & Siti Jama Hashim v. Tan Lip Eng & Anor [1997] 4 CLJ 509 SC ***(refd)***
Koh Siak Poo v. Perkayuan OKS Sdn Bhd & Ors [1989] 1 LNS 194 SC ***(refd)***
Law Kam Loy & Anor v. Boltex Sdn Bhd & Ors [2005] 3 CLJ 355 CA ***(refd)***
Master Strike Sdn Bhd v. Sterling Heights Sdn Bhd [2005] 2 CLJ 596 CA ***(refd)***
Sampo Materials (M) Sdn Bhd v. Tenaga Nasional Bhd [2015] 9 CLJ 902 CA ***(refd)***
Shell Malaysia Trading Sdn Bhd v. Lim Yee Teck & Ors [1982] 1 LNS 11 FC ***(refd)***
Sime Hok Sdn Bhd v. Soh Poh Sheng [2013] 2 CLJ 615 FC ***(refd)***
Theta Edge Bhd v. Infornential Sdn Bhd & Another Appeal [2017] 7 CLJ 53 CA ***(refd)***
Yap Lai Yoke v. Chin Fook Wah & Another Case [1984] 2 CLJ 282; [1984] 1 CLJ (Rep) 452 FC ***(refd)***

Legislation referred to:

Courts of Judicature Act 1964, s. 69
National Land Code, ss. 215(1), (3)(d), 396(2)
Specific Relief Act 1950, s. 18

For the appellant - SK Sivam; M/s PG Lim & Co
For the respondent - Jason Chan Wa Chiang & Ashwin Kumar; M/s S Mathews & Assocs

[Editor's note: Appeal from High Court, Kuala Lumpur; Civil Suit No: 22NCVC-123-03-2015 (overruling in part).]

Reported by Suhainah Wahiduddin

JUDGMENT

Umi Kalthum Abdul Majid JCA (majority):

Introduction

[1] The respondent's/plaintiff's claim against the appellants/defendants, amongst others, was essentially for specific performance of a sale and purchase agreement entered into between the plaintiff and the first defendant (D1) dated 26 February 2007 (SPA). There was dispute over the purchase price of the land, being the subject matter of the SPA, as parties could not agree on the actual area/size of the land.

[2] The defendants aver that the plaintiff has failed to perform its part of the SPA, has defaulted in the performance of and completion of the SPA, is not entitled to enforce the SPA and the plaintiff's claim should be dismissed with costs. D1 essentially counterclaims against the plaintiff for arrears of rental to the land as well as a declaration that the defendants are entitled to terminate the SPA, the first and second supplementary agreements.

[3] The learned High Court Judge had, amongst others, allowed the plaintiff's claim for specific performance of the SPA, and partially allowed D1's counterclaim for arrears of rental.

[4] The defendants now appeal against that decision of the learned judge.

[5] The following is the majority decision of YAA Justice David Wong Dak Wah and YA Justice Umi Kalthum binti Abdul Majid. Our learned brother YA Justice Hamid Sultan bin Abu Backer will give the dissenting judgment of the court. For ease of reference, parties will be referred to as they were in the High Court.

Brief Facts

[6] The brief facts of the case can be gleaned from the grounds of judgment of the learned judge and written submissions of the parties as follows:

(i) D1 is a company registered under the laws of Malaysia.

(ii) D2 and D3 are individuals and are husband and wife who owned the entire shareholding of D1 and are the only directors of D1.

(iii) D1 is the registered owner of the land held under title HS(D) 50111, PT No. 1789, Mukim and District of Kuala Lumpur, Wilayah Persekutuan with an area measuring approximately 7177.5 m^2 or 77,257.89 sq ft (1m^2 being equivalent to 10.7639 sq ft) (the land).

(iv) Pursuant to the SPA, the plaintiff had agreed to purchase and D1 had agreed to sell the land at the agreed purchase price of RM5,948,857.53 or RM77 per sq ft (purchase price).

(v) It was, amongst others, a term and condition of the SPA that:

(a) pursuant to cl. 20, the purchase price shall be adjusted accordingly at RM77 per sq ft based on the actual area of the land;

(b) pursuant to cl. 10, the vendor/D1 shall remove all encumbrances against the land on or before the completion date to enable the plaintiff to be registered as the owner of the land.

(vi) Pursuant to the SPA, a sum of RM594,885.75 was paid to the vendor/D1 as deposit.

(vii) *Vide* a supplementary agreement dated 2 June 2010 (first SA), the parties agreed to amend the area of the land stated in the SPA to approximately 6681.1822 m^2 from 7177.5 m^2.

(viii) Subsequently, *vide* another supplementary agreement dated 9 May 2011 (second SA) parties agreed to a revision of the purchase price to RM5,537,550.80 based on the revised area of 6681.1822 m^2 or 71,916.249 sq ft.

(ix) The consent for the transfer of the land to the plaintiff was obtained by way of a letter dated 11 November 2011 (consent to transfer) from the Pejabat Pengarah Tanah Dan Galian Wilayah Persekutuan (p. 58, core bundle 1).

(x) The memorandum of transfer was adjudicated and the stamp duty of RM160,128 was duly paid by the plaintiff on 23 February 2012.

(xi) The plaintiff then paid the differential sum of RM442,665.05 between the balance of the purchase price and the loan sum from the plaintiff's end financier to D1's solicitors *vide* letter dated 19 April 2012 whereby the latter was to hold the said sum as stakeholders.

(xii) Pending the completion of the SPA, D1 had assigned all its present and future rights under the SPA, including all amounts payable from the plaintiff to United Overseas Bank (Malaysia) Bhd. (UOB) pursuant to a loan taken by Luxstar Housing Development Sdn. Bhd., a company principally owned by D2, which resulted in a lienholder's caveat being entered against the land by UOB on 12 January 2012 (lienholder's caveat).

(xiii) Pursuant to a letter dated 2 April 2012 from UOB to the plaintiff's financier Kuwait Finance House (M) Bhd, the redemption sum payable to UOB to redeem the land and for the lienholder's caveat to be withdrawn was RM5 million to be paid no later than 27 June 2012.

(xiv) Pursuant to a letter dated 12 November 2014 from the plaintiff's solicitors to be defendants' solicitors demanding, amongst others, that the SPA be completed without delay and for the removal of the lienholder's caveat. This was followed up by a reminder letter dated 27 November 2014, but to no avail.

Plaintiff's Case

[7] The plaintiff contends the size of the land as represented by the defendants was 7177.5 m^2 or 77,257.85 sq ft. Hence, the agreed purchase price was RM5,948,857.53 or RM77 per sq ft.

[8] It was agreed between the parties that the purchase price shall be adjusted accordingly at RM77 per sq ft based on the actual area of the land. This is provided under cl. 20 of the SPA which is as follows:

20. Adjustment Of Purchase Price

Within Fourteen (14) days from the date of notification by one party to another the parties hereto hereby agree and declare that *in the event the measurements, boundaries and area of the said Property as provided herein are different from the measurements, boundaries and area as stated or shown in the separate qualified titles of the said Property, when issued, such discrepancy shall not annul the sale and purchase herein. PROVIDED THAT if there is a decrease or an increase only in the actual area of the said Property shown on the separate qualified titles issued in respect of the said Property, then the Purchase Price shall be adjusted accordingly at the Per Square Foot which is Ringgit Malaysia Seventy Seven (RM77.00) per square foot.* Any adjustment in price shall be paid by one party to the other forthwith upon its being determined that there is a discrepancy in the land area. (emphasis added)

[9] The plaintiff alleges that for the purpose of entering into the first SA and the second SA, D2 had represented to the plaintiff that after the Government's land acquisition *via Gazette* WKP No. 20009 dated 18 November 2004 (land acquisition), the remaining area of the land was 6681.1822 m^2.

[10] Despite repeated requests from the plaintiff and/or its financier for the purpose of the release of the balance purchase price, D1 failed to furnish any confirmation from the land office that the available area of the land after the land acquisition exercise was still 6681.1822 m^2 as represented and promised by D1/D2 under the first SA and the second SA.

[11] Subsequently, the plaintiff had obtained confirmation from the land office *vide* letter dated 1 April 2014 (p. 56, core bundle, vol. 1) that the actual remaining area of the land after the land acquisition was only 2139.68 m^2.

[12] At all material times, the plaintiff is ready and willing to complete the SPA based on the adjusted purchase price of RM1,773,412.04 (based on RM77 X 23,031.3252 sq ft or equivalent to 2139.68 m^2) (adjusted purchase price). However, D1, which is at all material times a company exclusively owned and controlled by the husband and wife D2 and D3 respectively, refused to proceed with the SPA and insisted that the area of the land is 7177.5 m^2 without producing any document to substantiate its position in the matter.

[13] Moreover, under cl. 10 of the SPA, it is the responsibility of D1 to remove all encumbrances on the land which is attributable to D1, which includes the lienholder's caveat. Clause 10 reads as follows:

10. Removal Of Encumbrance/s

The Vendor shall at his own cost and expense remove or cause all encumbrances against the said Property attributable to the Vendor save for such encumbrances caused or attributable to the Purchaser, if any, to be removed and or before the Completion Date to enable the Purchaser to be registered as owner of the said Property.

Defendants' Case And Counterclaim

[14] The defendants contend that D1, as the registered owner of the land, had agreed to sell to the plaintiff the land at the agreed purchase price of RM5,948,857.53 at RM77 per sq ft and that under cl. 20 of the SPA, the purchase price shall be adjusted accordingly at RM77 per sq ft based on the actual area of the land.

[15] The land is described in Recital 1 of the SPA and s. 4 of the First Schedule as measuring approximately 7177.5 m^2 as more particularly delineated in green in Annexure 1. This approximate land area of 7177.5 m^2 is the balance of the land after a portion acquired by the Government estimated at 4541.50 m^2 pursuant to the land acquisition. See Recital 2 of the SPA.

[16] The plaintiff, who was represented by solicitors before and after the execution of the SPA, was well aware of the title, land plan and final land survey plan and was fully appraised of the area of the land. It had knowingly and willingly entered into the SPA.

[17] D1 had also entered into a tenancy agreement dated 6 July 2007 with the plaintiff (tenancy agreement) to let the land at a rental of RM5,000 per month pending the transfer of the land to the plaintiff. The tenancy agreement has described the land as measuring approximately 7177.5 m^2. The plaintiff is in occupation of the land until now.

[18] The defendants acknowledge the provisions of the first and second SAs which had amended the area of the land as well as the stated purchase price.

[19] The consent to transfer and/or charge on the land from the Jawatankuasa Kerja Tanah, Wilayah Persekutuan, Kuala Lumpur was obtained on 11 November 2011 (consent). (See cl. 2.1 SPA.)

[20] It is a condition of the SPA that the sale and purchase of the land shall be completed by the plaintiff paying up the balance purchase price within three months from the date of receipt of the consent by the plaintiff's solicitors or within an extended 30-day period. (See cl. 3 read together with s. 3, Second Schedule, SPA.)

[21] Despite extensions of time having been granted from March 2013 until August 2013, the plaintiff has not been able to complete the purchase by paying up the balance of the purchase price stated in the second SA.

[22] It is wrong for the plaintiff to rely on the land office letter dated 1 April 2014 as its contents are incorrect as the final survey plan of the land was not taken into consideration and the final title has not been issued.

[23] As far as the defendants are concerned, the area of the land was and still is 7177.5 m^2 as stated in the SPA. Since the plaintiff did not complete the purchase as provided under the SPA, and the first and second SAs, the defendants are counterclaiming for a declaration that they are entitled to terminate the SPA, first and second SAs. D1 is also counterclaiming for the arrears of rental.

At The High Court

Issues

[24] The parties had agreed to four issues to be determined by the High Court as follows:

(i) whether the plaintiff is entitled to specific performance of the SPA and if so what is the purchase price based on the actual area of the land;

(ii) whether the corporate veil ought to be pierced to make D2 and/or D3 liable for the action of D1 and/or for conspiracy/misrepresentation, if any;

(iii) whether D1 is entitled to rental from September 2014;

(iv) whether D1 is entitled to terminate the SPA and the first and second SAs and to refund the monies paid by the plaintiff and nothing more.

[25] The learned High Court Judge made the following determinations.

Issue 1: Is Plaintiff Entitled To Specific Performance Of The SPA?

What Is The Purchase Price Of The Land?

[26] The learned judge made a finding of fact that, based on the evidence adduced and confirmed by the land office's letter dated 1 April 2014, the actual area of the land is 2139.68 m^2.

[27] Pursuant to cl. 20 of the SPA, which expressly provides for adjustment of the purchase price in the event that there is a decrease or increase in the actual areas as shown on the separate qualified titles, the purchase price has to be adjusted. Upon adjustment, the balance purchase price which is now due is RM735,861.24.

[28] The plaintiff is entitled to specific performance of the SPA.

Issue 2: Whether The Corporate Veil Should Be Pierced?

[29] From the evidence adduced, the learned judge found that D2 was the directing mind/alter ego of D1 and was solely responsible for the misrepresentation made to the plaintiff in respect of the area of the land.

[30] The justice of this case dictates that the corporate veil be lifted and D2 be held solely accountable.

Issue 3: Whether D1 Is Entitled To Rental From September 2014?

[31] The learned judge answered this issue in the affirmative based on the tenancy agreement seeing that the tenancy agreement is for payment of the agreed rental till perfection of the transfer of the land under the SPA (which has yet to be perfected).

Issue 4: Whether D1 Is Entitled To Terminate The SPA, First And Second SAs

[32] The learned judge answered this issue in the negative since she had found that the plaintiff is entitled to specific performance.

[33] The plaintiff's claim was mostly allowed by the learned judge with costs, in particular prayers (a), (b), (c), (d), (e), (f) (i)(ii) and (g), whilst the counterclaim of the defendants was partly allowed in that D1's counterclaim for rental of the land from September 2014 to date of judgment only was allowed.

[34] The defendants now appeal against that decision of the learned judge.

The Appeal

Defendants' Submission

[35] Before us, the defendants essentially raise four issues. They are:

(i) what is the actual area of the land?

(ii) whether the trial court was justified in lifting the corporate veil?

(iii) whether the trial court was correct in awarding damages to the plaintiff?

(iv) whether D1's counterclaim for declaration that it is entitled to terminate the SPA and the first and second SAs be allowed?

Actual Area Of The Land

[36] It is submitted by the defendants that based on the following factors, the area of the land is 7177.50 m^2 (after acquisition):

(i) Recital 1 read with s. 4 of the First Schedule, Recital 2(i) and (ii), of the SPA;

(ii) PW1 in oral evidence had agreed that the description of the land stated the area to be 7177.50 m^2 (p. 139, core bundle);

(iii) oral evidence of DW2 (pp. 194-204, core bundle), Penolong Pengarah, Jabatan Ketua Pengarah Tanah dan Galian, Kuala Lumpur and his letter dated 30 November 2015 – exh. D1 (p. 113, core bundle) confirming that the area of the land was 11719 m^2 before the acquisition of 4541.50 m^2;

(iv) oral evidence of DW3 (pp. 205-215, core bundle), Timbalan Pengarah Ukur II, Jabatan Ukur dan Pemetaan Wilayah Persekutuan Kuala Lumpur and his letter dated 23 November 2015 (p. 115, core bundle) which confirmed that the area of land was 11719 m^2 (there appears to be a mistake in his letter where he stated the land area to be 11715 m^2 but during oral evidence he stated it to be 11719 m2 based on the Plan Akui PA14102063 dated 6 August 1986 (p. 117, core bundle) as attached) before the acquisition of 4541.50 m^2;

(v) oral evidence of DW1 (pp. 178-179, core bundle), Penolong Pegawai Tanah, Pejabat Tanah dan Galian, Wilayah Persekutuan and his letter dated 24 November 2015 (p. 114, core bundle) confirmed that the title in continuation would be based on pelan akui PA14-102063;

(vi) further evidence allowed to be adduced by this court on 2 May 2017 as follows:

(a) letter dated 13 July 2016 from Pejabat Pengarah Tanah dan Galian, Wilayah Persekutuan (p. 253, core bundle) which confirmed that the area of land to be 11715 m^2 based on the pelan akui PA 14-102063 (before acquisition of 4541.50 m2);

(b) letter dated 24 August 2016 from Pejabat Pengarah Tanah dan Galian, Wilayah Persekutuan (p. 254, core bundle) which confirmed the land area to be 11719 m^2 before acquisition of 4541.50 m^2;

(c) Plan of the land dated 25 August 2016 (p. 255, core bundle) issued and certified by Pengarah Ukur dan Pemetaan, Wilayah Persekutuan Kuala Lumpur/Putrajaya showed area of land to be 11719 m^2 (before acquisition);

(d) Borang Permintaan Ukur dated 6 September 2016 (pp. 256-257, core bundle) states the area to be 7177.50 m^2;

(e) letter dated 10 July 2017 from Pejabat Tanah dan Galian, Wilayah Persekutuan (p. 309, core bundle) confirmed that Jawatankuasa Kerja Tanah dan Galian, Wilayah Persekutuan had approved the area of land to be 11719 m^2;

(f) D1 was requested to pay the premium and land tax for the said area and which was paid *vide* receipt at p. 311, core bundle;

(vii) by leave of this court on 4 August 2017, the defendants were allowed to produce fresh evidence in the form of the final title of the land, which was issued on 11 August 2017 (see Rekod Rayuan Tambahan IV) where it states that the area of the land is 11719 m^2 and there is an endorsement which states that about 4541.50 m^2 were acquired.

[37] That by virtue of sub-s. 396(2) of the National Land Code (NLC), the approved plan/pelan akui (PA14-102063) (p. 117, core bundle) by the Director of Survey and Mapping shall be conclusive evidence of the area of the land to be 11719 m^2 (before acquisition). The defendants cited three authorities on this issue as follows:

(i) *Yap Lai Yoke v. Chin Fook Wah & Another Case* [1984] 2 CLJ 282; [1984] 1 CLJ (Rep) 452 FC;

(ii) *Associated Pan Malaysia Cement Sdn Bhd v. Westwood Development Sdn Bhd* [2013] 10 CLJ 95 HC;

(iii) *Associated Pan Malaysia Cement Sdn. Bhd. v. Westwood Development Sdn Bhd* [2012] 2 CLJ 81 HC.

[38] Further, it is submitted that the learned judge had failed to consider the documents and/or give credence to the oral evidence of DW1, DW2 and DW3 who are officers of the relevant Government department and the contents of the letters referred to above. The learned judge had relied on one letter from the Pejabat Tanah dan Galian, Wilayah Persekutuan Kuala Lumpur dated 1 April 2014 (p. 86, core bundle) which stated:

2. Dimaklumkan bahawa luas baki sebenar adalah 2139.68 meter persegi.

As the maker of this letter was not called to testify, and this letter was placed in Part B of the agreed bundle, the defendants submit that this letter is inadmissible, citing *Jaafar Shaari & Siti Jama Hashim v. Tan Lip Eng & Anor* [1997] 4 CLJ 509 SC, *Sampo Materials (M) Sdn. Bhd. v. Tenaga Nasional Bhd* [2015] 9 CLJ 902 CA and *Ab Latef & Associates (M) Sdn Bhd v. Govindasamy Suppiah* [2016] 10 CLJ 1 CA as authorities for their submission.

[39] The learned judge had also misapplied and/or misconstrued and/or did not consider the terms of the SPA *vis* cl. 20, cl. 3, s. 3 of Second Schedule, cls. 4, 17, 23 and 27 of the SPA.

Lifting Corporate Veil

[40] The learned judge had unjustifiably pierced the corporate veil when there was no evidence of misrepresentation or conspiracy or fraud by D2/D3 adduced, citing *Formis Resources Bhd & Ors v. Risk Management and Safety System Pty Ltd & Ors and Other Appeals* [2016] 9 CLJ 169 CA and *Theta Edge Bhd v. Infornential Sdn Bhd & Another Appeal* [2017] 7 CLJ 53 CA as their authorities.

Damages Awarded

[41] It is further submitted that the learned judge had awarded damages to the plaintiff which ought not be awarded pursuant to cl. 17 of the SPA, which provides as follows:

17. State Of Property And Purchase On As Is Where Is Basis

The Purchaser has examined and inspected the Property and the Purchaser is satisfied as to its present state, condition and use deemed to have accepted and agreed to the purchase of the Property on as is "where is basis". The Purchaser shall not be entitled to rescind the purchase or to make any claim for compensation or reduction of the Purchase Price or to claim for damages in respect of any misdescription of the area, location, condition, state and use of the Property.

Counterclaim

[42] In regard to the defendants' counterclaim, it is submitted that the plaintiff has failed to pay the balance purchase price despite several extensions of time to pay were granted and therefore the plaintiff has failed to complete the purchase. Since the plaintiff's obligation to pay the balance purchase price is a fundamental obligation, the breach of which goes to the root of the SPA, this breach renders the SPA terminated and notice of the termination is not necessary – see *Master Strike Sdn Bhd v. Sterling Heights Sdn Bhd* [2005] 2 CLJ 596 CA; *Sime Hok Sdn Bhd v. Soh Poh Sheng* [2013] 2 CLJ 615 FC.

The Plaintiff's Submission

Actual Area Land

[43] It is the plaintiff's submission that pursuant to cl. 20 of the SPA, the plaintiff and D1 had agreed that the purchase price shall be adjusted according to the separate qualified title of the land when issued. *Vide* letters dated 26 March 2008 and 29 March 2008, D1's solicitors had informed the plaintiff's solicitors (tabs 4 and 5, respondent's supplemental core bundle (RSCC)) that the issue document of title (IDT) to the land is pending issuance and that once it is issued, they (D1's solicitors) will proceed with the application for consent to transfer.

[44] The separate qualified title/IDT ("HSD50111") was collected by the defendants on 17 June 2009 (p. 4, core bundle 1). When the consent to transfer was obtained on 11 November 2011, the only thing left to be done was for the title to be forwarded to the plaintiff/purchaser and the purchase price to be adjusted and paid to D1/vendor before the land is transferred.

[45] However, D1 refused to adjust the purchase price according to cl. 20. D1, instead of forwarding the title to the plaintiff to complete the SPA, had charged the land to UOB for a loan taken by Luxstar Housing Development Sdn. Bhd. Thus the lienholder's caveat was entered against the land. D1 had failed to remove the lienholder's caveat to date (see tab 1, respondent's executive summary) contrary to its obligations under cl. 10 of the SPA and this has prevented the plaintiff to be registered as the owner of the land and

hence the SPA cannot be completed. To this end, the plaintiff has indicated clearly it is prepared to forward the balance purchase price subject to the removal of the encumbrance.

[46] What the defendants attempted to do is to rewrite the contract and delay its completion until such time the final title is issued to reflect a bigger area so as to circumvent what was agreed in cl. 20. What was agreed in the SPA is for the land to be paid and transferred according to the qualified title which was issued. That qualified title has temporary finality for whatever rights and interest which are being transferred to the transferee/plaintiff – see sub-ss. (1) and (3) (d) of s. 215 of the NLC:

> **Form, and effect generally, of transfer of land**
>
> 215(1) The transfer under this Act of an alienated land shall be effected by an instrument in Form 14A.
>
> …
>
> (3) The transferee of any alienated land shall hold the same subject to:
>
> …
>
> (d) all other matters **then** appearing on, or referred to in, the register document of title. (emphasis added)

[47] D1 had executed Form 14A to transfer HS(D) 50111 to the plaintiff, and parties under the SPA had agreed to complete the purchase based on what had then been agreed appearing in HS(D) 50111. The fact that the area appearing in HS (D) 50111 was then regarded as final was confirmed by the land office *vis* evidence of DWI (p. 178, core bundle 1). As the defendants insisted that the purchase price be based on the area of land to be 7177.5 m^2, which is not reflected in HS(D) 50111, which stated the land area to be 6681.1822 m^2, the plaintiff then wrote to the land office which, *vide* letter dated 1 April 2014, confirmed that the actual area of the land was 2139.68 m^2. (It would appear to us that the land office had taken the land area to be 6681.1822 and after minusing the area of land acquired at 4541.50 m^2 to derive the land area to be 2139.68 m^2). All that the learned High Court Judge did was to restore the position of the parties according to what the parties had agreed under the SPA by way of specific performance and reflected in cl. 14 of the SPA. In this context, it is not for the courts to rewrite a contract which has been freely entered into between the parties – see *Koh Siak Poo v. Perkayuan OKS Sdn. Bhd. & Ors* [1989] 1 LNS 194; [1989] 3 MLJ 164, SC; *Shell Malaysia Trading Sdn. Bhd. v. Lim Yee Teck & Ors* [1982] 1 LNS 11; [1982] 2 MLJ 181, FC.

Lifting Corporate Veil

[48 With regard to the issue of piercing the corporate veil, we are urged not to overturn the learned High Court Judge's finding of fact as she had the benefit of seeing and hearing the witnesses. The plaintiff submits that it is D2, by himself as well as on behalf of D3, who is his wife, who is/or the directing mind/alter ego of D1. As D3 chose not to testify in court, there was nothing for her to contradict what D2 had admitted or alleged by the plaintiff.

Damages Awarded

[49] The plaintiff submits that the damages awarded to the plaintiff for the amount of RM135,165.85 incurred by the plaintiff as additional legal fees and stamp duty based on the higher purchase price compared to the adjusted purchase price for the land is pursuant to s. 18 of the Specific Relief Act 1950.

Counterclaim

[50] On the issue of rental of the land from September 2014, as the defendants did not raise the issue of rental awarded to D1 in their memorandum of appeal and additional memorandum of appeal, and neither did the plaintiff raise any cross-appeal on the matter, there is nothing to consider herein. As for D1's counterclaim for a declaration that it is entitled to terminate the SPA and the first and second SAs, the plaintiff, in submitting that specific performance of the SPA should be allowed, has in not so many words indicated that, for the reasons it gave as to why the specific performance of the SPA be allowed, D1's counterclaim on this aspect should not be allowed.

Our Majority Decision

[51] After careful consideration of the parties' submissions, the pleadings and the evidence tendered (oral and documentary), we are of the majority view that the appeal be allowed in part, and we do so order, as per paras. [63] to [65] below. We do so for the following reasons.

Actual Land Area

[52] We agree that the crucial issue before this court is, as it was in the High Court, what is the actual area of the land purchased by the plaintiff. We agree with the submission of the defendants as elucidated in paras. [36] to [39] above. It is very clear to us that the land area, after deducting the area acquired by the Government, is 7177.50 m^2 and NOT 2139.68 m^2 as found by the learned High Court Judge. We agree with the defendants that the learned High Court Judge had seriously erred in making the finding of fact that the land area is 2139.68 m^2 merely by relying on the land office's letter dated 1 April 2014. In the first place, we accept the defendants' submission

that as this letter dated 1 April 2014 was in Part B of the agreed bundle and its maker was not called to testify, the said letter is inadmissible – see the authorities cited by the defendants. What this means is that the basis of the plaintiff's case on the actual area of the land falls. The plaintiff's contention that by virtue of cl. 20 of the SPA, it was envisaged a separate qualified title is to be issued, and it was issued in the form of HS(D) 50111 (p. 4, core bundle) which showed the area of the land to be 6681.1822 m^2 and therefore there must be an adjustment made to the area of the land as well as the purchase price under cl. 20, we fear is very much misconceived. This is because even the plaintiff's witness, PW1, had agreed that the qualified title in Borang 11A (pp. 1-3, core bundle) is the same as the qualified title in Borang 11AK (pp. 4-5, core bundle). He also agreed that the latter was issued pursuant to the computerisation programme of the land office. Below is an extract of the notes of proceedings (NP) during the cross-examination of PW1 as follows (pp. 145-146 core bundle, vol.1):

DC: Datuk, we are at page 31 bundle B Part B. Now this title, my instruction are, was issued pursuant to the computerisation programme of the Land Office and this title is no different from the title at page 1 in the sense of particulars and measurements *et cetera.*

PW1: No, I disagree because page 1 shows 71918 square feet whereas bundle in Part B page 31 shows an area of 6681.1822 square metres. There is slight different, I believe.

J: Now you are saying Part A in page 1 is what is the acreage?

DC: 1.651 ekar and 71918 …

J: 71918 …

DC: Square feet.

DC: It works, My Lady, it works out on a conversation basis to be the same, approximately the same amount. I work it out but I don't brought my working.

PC: **I confirm that. I think its change the matriks.**

DC: Except for the matriks system, everything else is the same except the format in page 31 is a computerised format. You agree Datuk?

PW1: **Yes, I do.**

DC: So, you agree that this is not a new title which has been issued for this property?

PW1: We are from beginning made to understand the title was surrendered. In a normal process of acquisition the original title is surrendered and a new title will be issued. After a survey has been conducted. And this copy of the title was given to us somewhere in 2010 if I'm not mistaken. (emphasis added)

[53] What this means is that, even though both parties did not raise this aspect in their pleadings, the execution of the first and second SAs were done by both D1 and the plaintiff on the error of understanding between the "original" qualified title as against the computerised qualified title/HSD 50111. We therefore agree with the defendants' submission that in the premises, cl. 20 of the SPA does not apply. (We note that both parties in their submissions have played down reference to the first and second SAs, and mainly focused on the provisions of the SPA. But the existence of the first and second SAs will very much determine the rights and obligations of the respective parties as stated below.)

[54] What this also means is that, taking into account the evidence referred to in sub-paras. 36(iii), 36(iv), 36(v) and 36(vi) above, the area of the land can only be 7177.50 m^2, after taking the total area of the land before the acquisition and as per the pelan akui PA14-102063 to be 11719 m^2 and subtracting the area of land acquired as 4541.50 m^2. In this context, we agree with the defendants' submission in para. [37] above and the reference to sub-s. 396(2) of the NLC. Subsection 396(2) of the NLC provides as follows:

> (2) Any plan approved by the Director of Survey and Mapping under paragraph (1)(e) shall be filed in his office, and (without prejudice to the operation of section 49 in the case of land subsequently affected by any advance of the shore-line or of the bed of any river) **shall be conclusive evidence of the boundaries** and boundary marks of the land to which it refers, **and of the area and the lot number thereof.** (emphasis added)

Thus, the area of the land described in the Recital 1 read with s. 4 of the First Schedule, and Recital 2 (i) and (ii) to be 7177.50 m^2 is correct. This area of the land is further confirmed by the final title of the land issued on 11 August 2017 which states the area of the land concerned is 11719 m^2, and has an endorsement which states that about 4541.50 m^2 were acquired. If the area acquired is subtracted from the total area of the land concerned, it will give rise to the balance of land area to be 7177.50 m^2, that is, the actual land area purchased by the plaintiff.

Lifting of Corporate Veil

[55] On this issue, we agree with the defendants' submission that the learned judge had unjustifiably lifted the corporate veil to find that D2 is the directing mind/alter ego of D1 and is therefore solely responsible for the misrepresentation made to the plaintiff. Without alluding to the actual evidence adduced in court, the learned judge, with respect, made the following so-called finding of fact:

> *Issue 2: Whether the corporate veil should be pierced?*
>
> 38. From the evidence it is clear that D2 was the directing mind/alter ego of D1 and to my mind, was solely responsible for the misrepresentation made to the Plaintiff in respect of the area of the land.

39. I find that the justice of this case dictates that the corporate veil be lifted and D2 be held accountable. A

[56] In the first place, and even though it was an agreed issue to be tried by the court, the plaintiff in its statement of claim (SOC) did not plead for the lifting of the corporate veil so as to find D2, let alone D3, personally liable. Neither did the plaintiff prayed for the relief against D2 and D3 personally. Instead, the plaintiff, at paras. 26 to 28 of the SOC, pleaded that D1, D2, D3 (referred to as "the defendants") had conspired between themselves to injure the plaintiff by preventing and/or delaying the completion of the SPA by making representation and promise that the land area is at 6681.1822 m^2 despite knowing it is untrue and causing/allowing the land to be encumbered with the lienholder's caveat from UOB and refusing to redeem the land to ensure that the SPA can be completed. It is trite law that a party is bound by its pleadings and on that score alone the plaintiff is precluded from seeking this relief. Our view is fortified by the fact that, after scrutinising the order of the High Court dated 24 May 2016, we do not see any reference to the liability of D2, let alone D3, to bear personally damages attributed to D1. B C D

[57] In any event, and we understand that "in some instances, evidence adduced during the hearing can overcome the defects in pleadings as long as the other party is not taken by surprise. More so if such evidence when given without any objection by the opposing party will further have the effect of curing the absence of such plea in the relevant pleading …" (see *Gurbachan Singh Bagawan Singh & Ors v. Vellasamy Pennusamy & Other Appeals* [2015] 1 CLJ 719 FC). And so for the sake of completion, we agree with the defendants that the plaintiff has failed to prove that there was misrepresentation, or conspiracy or fraud by D2 and D3 on the plaintiff, and to lift the corporate veil when the law will only countenance it if fraud is established. E F

[58] In the Federal Court decision of *Gurbachan Singh Bagawan Singh & Ors v. Vellasamy Pennusamy & Other Appeals* (*supra*) it was held as follows:

> [96] But in the event that we should, we are of the view that it is now a settled law in Malaysia that the court would lift the corporate veil of a corporation if such corporation was set up for fraudulent purposes, or where it was established to avoid an existing obligation or even to prevent the abuse of a corporate legal personality. G
>
> [97] As to what constitutes fraudulent purposes it has been described as to include actual fraud or fraud in equity. And fraud in equity occurred in '… cases where there are signs of separate personalities of companies being used to enable persons to evade their contractual obligations or duties, the court would disregard the notional separateness of the companies … H

I

See also the Court of Appeal case of *Law Kam Loy & Anor v. Boltex Sdn. Bhd. & Ors* [2005] 3 CLJ 355, per Gopal Sri Ram JCA (as he then was) at p. 362, as follows:

> In my judgment, in the light of the more recent authorities such as *Adams v. Cape Industries Plc* [1990] Ch 433, it is not open to the courts to disregard the corporate veil purely on the ground that it is in the interests of justice to do so. It is also my respectful view that the special circumstances to which Lord Keith referred include cases where there is either actual fraud at common law or some inequitable or unconscionable conduct amounting to fraud in equity.

[59] All that the plaintiff submits is to show the fact that D2 is the directing mind/alter ego of D1 (see paras. 38-40, respondents' submission) and nothing else. D2 being the alter ego of D1 without more cannot in the circumstances give rise to a situation of fraud, misrepresentation or conspiracy so as to justify the lifting of the corporate veil of D1 and to affix personal liability on D2 only. Moreover, what was alleged to be a conspiracy, misrepresentation or fraud by the defendants on the plaintiff as we can see is actually rooted in the misapprehension of the computerised qualified title in Borang 11 AK by the parties as alluded to earlier. In the circumstances, we find the plaintiff has failed to prove the conspiracy, misrepresentation or fraud by the defendants.

Awarding Of Damages To Plaintiff

[60] The learned High Court Judge in her grounds of judgment had awarded "RM112,928.64 being additional stamp duty and RM135,165.85 being extra legal fees" (see para. [43], grounds of judgment). But in sub-para. 45(k) of her grounds of judgment she stated as follows:

> 45. The Plaintiff's claim is allowed and the Defendant's counter claim is allowed in part. In the circumstances, the following are allowed:
>
> …
>
> (k) The sum of RM135,165.85 shall be set off against the balance purchase price and the rental due to D1 from September 2014;

The sealed order of the High Court dated 24 May 2016, at para. (i) states as follows:

> (i) Damages of RM 135,165.85 to be paid by the Defendants upon setting-off the sum of RM 105,000.00 as rental of the Property from September 2014 to the date of this Order only;

As parties did not see it fit to seek clarification from the learned High Court Judge on the discrepancy found in her grounds of judgment as against the High Court Order dated 24 May 2016, we will regard the disputed amount of damages awarded to the plaintiff as being RM135,165.85.

[61] In view of our decision that the actual area of the land is 7177.50 m^2, and not 2139.68 m^2 as claimed by the plaintiff, we are of the view that the alleged "damages" so suffered by the plaintiff was not of the defendants' making but due to the insistence of the plaintiff on its own surmisation of the documents that it has misconstrued. As such, the plaintiff is not entitled to the damages awarded. In any case, cl. 17 of the SPA precludes the plaintiff from making such a claim.

Counterclaim

[62] The question arises whether, in the light of our decision that the actual land area is 7177.50 m^2 as provided by the SPA, can the defendants'/D1's counterclaim for a declaration that it is entitled to terminate the SPA and the first and second SAs be allowed, seeing that the plaintiff has failed to pay the balance purchase price? After careful consideration, we are of the view that D1's counterclaim to terminate the SPA and the first and second SAs cannot be allowed for the following reasons:

(i) the plaintiff had paid RM594,885.75 to D1 as deposit for the purchase price pursuant to cl. 1 read together with s. 1 of the Second Schedule to the SPA. There is no issue on this payment made. The deposit amount is based on the agreed purchase price of RM5,948,857.53 in respect of the approximate land area of 7177.5 m^2 as per the SPA. This payment clearly showed the plaintiff's intention to complete the sale;

(ii) parties had anticipated that when the qualified title to the land had been surrendered to the land office by D1, the land office would be issuing a new title, which was pending at the time the SPA was executed. In view of this uncertainty in the area of the land, cl. 20 of the SPA was included;

(iii) after the signing of the SPA on 26 February 2007, the new title was still not available to the plaintiff even as late as 2009. But *vide* the 24 June 2009 letter, the plaintiff informed D1 that based on a land search that they made, the area of the land is 6681 m^2 (p. 386, appeal record, vol. 2);

(iv) after a meeting held on 2 July 2009, parties agreed for the plaintiff to appoint a land surveyor to confirm the exact land area and a confirmation of it from the land office. D1, *vide* letter dated 28 July 2009, enclosed a letter dated 22 July 2009 from Jurukur Setia Sdn. Bhd. (Jurukur Setia) stating that the original size of the land was 11719 m^2. After deducting an area of 4541.5 m^2 for the land acquisition, the balance available was 7177.5 m^2. In the letter, Jurukur Setia had enclosed an approved plan and a Form E issued for the land acquisition;

(v) then *vide* letter dated 23 March 2010, D1's solicitors forwarded the "qualified title" for the land issued by the land office to the plaintiff's solicitors. That land title was issued on 13 February 2008 and which stated the land area to be 6681.1822 m^2 (p. 4, core bundle, vol. 1). In the same letter, D1's solicitors also informed the plaintiff's solicitors that D1 has no objection for parties to enter into a supplementary agreement to amend the SPA based on the land area stated in the said title. The first SA was then executed by the parties, to be followed by the second SA to revise the purchase price to RM5,537,550.80 based on the revised area of land of 6681.1822 m^2 (see PW1's witness statement WSP1, Q&A 4 and 5);

(vi) based on the events which had occurred and referred to in sub-paras. 62(iii) to 62(v) above, especially in regard to the circumstances which led to the execution of the first and second SAs, we find both parties were under the misapprehension that the actual area of the land is 6681.1822 m^2, whereas the actual area is 7177.50 m^2 as we have elucidated above;

(vii) since both parties were under the misapprehension on the actual area of the land, as evinced by the first and second SAs, we are of the view that the plaintiff cannot be faulted for acting as it did on the premise that the land area is now approximately 6681.1822 m^2, and not 7177.50 m^2 and that the revised purchase price is RM5,537,550.80 and not RM594,885.75. Hence, when the plaintiff, *vide* letter dated 19 April 2012 (p. 74, core bundle, vol. 1), purportedly paid the differential sum of RM442,665.05 between the balance purchase price and the loan sum from the plaintiff's end financier to D1's solicitors to be held as stakeholders, we regard the plaintiff in doing so as acting in good faith in pursuance of the provisions of the SPA read together with the first and second SAs;

(viii) all this while the plaintiff, and/or its financier had shown that they had made repeated requests to D1 (for the purpose of the release of the balance purchase price) but D1 had failed to furnish confirmation from the land office that the available area of the land after the land acquisition was still 6681.1822 m^2. The plaintiff then purportedly obtained the confirmation from the land office *vis* letter dated 1 April 2014 (which we have earlier found to be inadmissible) which purportedly confirmed the actual remaining area of the land after the land acquisition to be approximately 2139.6822 m^2. Thereafter, the plaintiff took into account the previous part payments made by it and concluded that the balance purchase price for the land due to D1 is RM735,861.24 (see para. 18, statement of claim, p. 57, record of appeal, vol. 1). To us, it is well within the plaintiff's rights to take such

actions so as to assist D1 in the matter to complete the SPA soonest. It, moreover, show to us the plaintiff is at all material times ready, able and willing to complete the SPA;

(ix) D1 had, however, in the meantime assigned all its present and future rights under the SPA, including all amounts payable by the plaintiff to UOB pursuant to the loan taken by Luxstar Housing Development Sdn. Bhd. owned by D2, resulting in the lienholder's caveat being entered by UOB on 12 January 2012. It is obvious to us that by encumbering the land with the lienholder's caveat, D1 had acted against cl. 10 of the SPA, and had prevented the plaintiff from making the balance purchase price (*albeit* for a lesser sum) to D1 and accordingly register itself (the plaintiff) as the owner of the land;

(x) D1 had not at any time before the suit was filed given notice to the plaintiff that they wanted to terminate the SPA for fundamental breach of contract on the part of the plaintiff for failure to make payment of the balance purchase price. Instead, D1 had proceeded to take actions as if the parties were still contemplating the completion of the SPA and dealing with issues pertaining to the actual area of the land. In view of this, we are also of the view that, even if there was a fundamental breach of contract by the plaintiff (which we do not find), D1 had waived its rights to terminate the SPA for fundamental breach of its terms and cannot now counterclaim for a declaration that it is entitled to terminate the SPA;

(xi) further, we note that D1 has also counterclaimed for rental of the land to the plaintiff under the tenancy agreement whereby the plaintiff has agreed to accept a tenancy of the land under the SPA from 15 May 2007 until perfection of the transfer of ownership of the land to the plaintiff upon the terms and conditions stated in the tenancy agreement. The plaintiff has been paying rental for the land but has stopped paying from September 2014 until June 2015 and continuing by reason that the defendants had delayed completion of the SPA. By virtue of the tenancy agreement, the plaintiff is in physical possession of the land until now.

Conclusion

[63] For all the reasons stated:

(i) in paras. [51] to [61] above, we allow the defendants' appeal in part;

(ii) in para. [62] above, we dismiss the defendants' appeal in regard to D1's counterclaim for a declaration that it is entitled to terminate the SPA, the first and second SAs.

[64] The order of the High Court dated 24 May 2016 is to the extent stated below modified as follows, and wherever the reference is made to the word "order" it shall mean the order of this court, unless stated otherwise:

(i) para. (b): "A declaration that the purchase price of the sale and purchase agreement dated 26 February 2007 between the plaintiff and the first defendant ("the SPA") is RM5,948,857.53";

(ii) para. (d): "An order that the defendants shall at their own cost and expense remove or cause all encumbrances against the property attributable to the first defendant to be removed, including the lienholder's caveat entered by United Overseas Bank (Malaysia) Berhad ("UOB") on 12 January 2012 within 30 days from the date of this order, to enable the plaintiff to be registered as the owner of the property;"

(iii) para. (e): "An order that the defendants shall at its own cost and expense deliver to the plaintiff's solicitor within 90 days from the date of this order the following:

(a) the original issue document of title of the property;

(b) a valid memorandum of transfer to transfer the property to the plaintiff duly executed by the first defendant; and

(c) a valid consent for the transfer of the property to the plaintiff from the relevant authority;"

(iv) para. (g): "An order that the plaintiff's solicitor release the balance purchase price of RM5,353,971.78 to the first defendant within seven days of compliance with prayer (e) by the defendants or prior to presenting the memorandum of transfer to the land office for registration;"

(v) para. (h): "An order that the Pendaftar Hakmilik/Pentadbir Tanah Wilayah Persekutuan Kuala Lumpur give effect to this order for the transfer of the property to the plaintiff;"

(vi) para. (i): "The sum of RM105,000 as rental of the property from September 2014 to the date of the High Court Order (24 May 2016) only shall be paid by the plaintiff to D1;"

(vii) para. (l) : Is set aside.

[65] We order each party to bear their own costs for here and below.

Hamid Sultan Abu Backer JCA (dissenting):

[66] I have read the grounds of judgment of my learned sister Umi Kalthum binti Abdul Majid JCA where in essence had held that:

(a) Specific performance granted by the High Court was affirmed with the adjustment as to the purchase price;

(b) The defendant's counterclaim as to termination of the sale and purchase agreement for non-payment as per the agreed terms was dismissed.

[67] In the instant case, my learned sister had set out the facts and issues in great detail. I do not wish to repeat, save to say that this judgment must be read together with the judgment of my learned sister.

[68] The plaintiff's prayers read as follows:

(a) Satu Deklarasi bahawa Plaintif adalah pembeli dan pemilik benefisial yang sah untuk hartanah yang dipegang di bawah hakmilik HS(D) 50111, PT No. 1789, Mukim dan Daerah Kuala Lumpur, Wilayah Persekutuan ("Hartanah tersebut");

(b) Satu Deklarasi bahawa harga belian Perjanjian Jual Beli bertarikh 26-2-2007 antara Plaintif dan Defendan Pertama ("Perjanjian Tersebut") adalah RM1,773,412.04 atas pindaan dibawah Klausa 20 Perjanjian tersebut;

(c) Satu Perintah bahawa Perjanjian tersebut dilaksanakan secara spesifik;

(d) Satu Perintah bahawa Defendan-Defendan perlu atas kos dan perbelanjaan sendiri mengeluarkan atau menyebabkan untuk dikeluarkan segala bebanan di atas Hartanah tersebut yang disebabkan oleh Defendan Pertama, termasuk kaveat pemegang lien yang dimasukkan oleh United Overseas Bank (Malaysia) Berhad ("UOB") pada 12-1-2012 dalam masa 30 hari dari tarikh Perintah ini, supaya membolehkan Plaintif untuk didaftarkan sebagai pemilik Hartanah tersebut;

(e) Satu Perintah bahawa Defendan-Defendan perlu atas kos dan perbelanjaan sendiri menyerahkan kepada peguamcara Plaintif dalam masa 60 hari dari tarikh Perintah ini yang berikut:-

(i) Hakmilik asal untuk Hartanah tersebut;

(ii) Satu memorandum pindahmilik yang sah untuk memindahmilik Hartanah tersebut kepada Plaintif yang telah ditandatangani oleh Defendan Pertama; dan

(iii) Satu kebenaran yang sah untuk memindahmilik Hartanah tersebut kepada Plaintif daripada pihak berkuasa yang berkenaan.

(f) Satu Perintah bahawa sekiranya Defendan-Defendan gagal untuk mematuhi perenggan (e) dalam masa yang dihadkan di situ, maka:

(i) Plaintif adalah bebas untuk memulakan proses pelaksanaan bagi maksud memaksa Defendan-Defendan tersebut supaya mematuhinya;

(ii) Penolong Kanan Pendaftar Mahkamah Tinggi Kuala Lumpur adalah bebas untuk melaksanakan apa-apa memorandum pindahmilik, surat, permohonan atau sebarang dokumen yang diperlukan bagi tujuan pendaftaran Plaintif sebagai pemilik Hartanah tersebut;

(iii) Plaintif adalah bebas untuk membelanjakan semua kos yang diperlukan bagi tujuan pendaftaran Plaintif sebagai pemilik Hartanah tersebut dan kos ini ditaksirkan dan dibayar oleh Defendan-Defendan atas dasar indemniti.

(g) Satu Perintah bahawa peguamcara Plaintif melepaskan baki harga belian sejumlah RM735,861.24 kepada Defendan Pertama dalam masa tujuh (7) hari dari tarikh pematuhan perenggan (e) di atas oleh Defendan-Defendan atau sebelum penyerahan memorandum pindahmilik ke pejabat tanah untuk pendaftaran;

(h) Satu Perintah bahawa Pendaftar Hakmilik/Pentadbir Tanah Wilayah Persekutuan Kuala Lumpur memberi kesan kepada Perintah ini untuk memindahmilik Hartanah tersebut kepada Plaintif;

(i) Gantirugi untuk ditaksirkan dan dibayar oleh Defendan-Defendan;

(j) Pihak-pihak diberi kebebasan untuk memohon;

(k) Sebagai alternatif kepada perenggan (a) hingga (j) di atas, satu Perintah bahawa Defendan-Defendan memulangkan dan membayar wang sejumlah RM1,037,550.80 bersama gantirugi tertentu yang dipersetujui sejumlah RM594,885.75 kepada Plaintif dalam masa empat-belas (14) hari dari tarikh Perintah ini;

(l) Faedah untuk mana-mana jumlah yang dibenarkan oleh Mahkamah di sini pada kadar 10% setahun dari tarikh Writ ini sehingga tarikh penyelesaian penuh;

(m) Kos; dan

(n) Relif selanjut atau lain yang dianggap suaimanfaat oleh Mahkamah Yang Mulia ini.

[69] The defendants' counterclaims read as follows:

(a) judgment in the sum of RM50,000/- being arrears of rentals;

(b) an order that Plaintiff pay all arrears of rentals that become payable until date of judgment;

(c) interest and costs;

(d) a declaration that the Defendants are entitled to terminate the SPA, the 1st and 2nd supplementary agreements and refund the monies paid by Plaintiff to Defendants and nothing more.

Brief Facts And Grounds Of Decision Of The High Court

[70] The brief facts and grounds of decision of the High Court as placed before us in a rudimentary manner read as follows:

BRIEF FACTS

1. The 2nd and 3rd Defendants were and are at all material time husband and wife who owned the entire shareholding as well as being the only two directors of D1.

2. Pursuant to the sale and purchase agreement [SPA] dated 26.2.2007 the Plaintiff had agreed to purchase and D1 had agreed to sell a piece of land held under title HS(D) 50111, PT No. 1789, Mukim and District of Kuala Lumpur, Wilayah Persekutuan for an area measuring approximately 7177.5m or 77,257.89 square foot (1m being equivalent to 10.7639 square foot) at the original agreed purchase price of RM5,948,857.53 or RM77.00 per square foot (the Land).

3. It was *inter alia* a term and condition of the SPA that:

   (i) Pursuant to clause 20, the purchase price shall be adjusted accordingly at RM77.00 per square foot based on the actual area of the Land;

   (ii) Pursuant to clause 10 of the SPA, Dl shall remove all encumbrances against the Land attributable to D1 on or before the completion date to enable the Plaintiff to be registered as the owner of the Land.

4. Pursuant to the SPA, a sum of RM594,885.75 was paid to the vendor as deposit. Thereafter, by way of a supplementary agreement dated 2.6.2010 (1st SA) the parties agreed to amend the area of the land stated in the SPA to approximately 6681.1822m from 7177.5m. This was followed by another supplementary agreement dated 9.5.2011 (2nd SA) whereby the parties agreed to a revision of the purchase price to RM5,537,550.80 based on the revised area of 6681.1822m or 71,916.249 square foot.

5. The consent for the transfer of the Land to the Plaintiff was obtained by way of letter dated 11.11.2011 from Pejabat Pengarah Tanah dan Galian Wilayah Persekutuan. The memorandum of transfer was adjudicated and the stamp duty of RM 160,128.00 duly paid by the Plaintiff on 23.2.2012. The Plaintiff then proceeded to pay the differential sum of RM 442,665.05 by way of a letter dated 19.4.2012 to D1's solicitors to be held as stakeholders.

6. Pending the completion of the SPA, D1 had consented to a lienholders caveat being entered over the Land as security for a loan obtained by Luxstar Housing Development Sdn Bhd from United Overseas Bank (M) (UOB), which resulted in a lienholder's caveat being entered against the Land by UOB on 12.1.2012 (the Lienholder's Caveat).

7. D1 also assigned to UOB the sale proceeds under the SPA as security for the loan. Notice of Assignment was given to the Plaintiff by D1. Pursuant to a redemption statement dated 2.4.2012 from UOB to the Plaintiff's then financier Kuwait Finance House (M) Bhd, the redemption sum payable to redeem the Land and for the Lienholder's Caveat to be withdrawn was RM5,000,000.00 to be paid no later than 27.6.2012.

8. The Plaintiff's solicitors sent a letter of demand dated 12.11.2014 to the erstwhile solicitors for the Defendants. Plaintiff's contended that among others are:

(a) The Plaintiff contends the size of the Land as represented by the Defendants was 7177.5m (or 77,257.89 square foot: 1m being equivalent to 10.7639 square foot). Hence the agreed purchase price was RM 5,948,857.53 or RM77.00 per square foot.

(b) Under clause 20 of the SPA, it was agreed that the purchase price shall be adjusted accordingly at RM77.00 per square foot based on the actual area of the Land.

(c) Despite repeated requests from the Plaintiff and/or its financier for the purpose of the release of the balance purchase price, D1 had failed to furnish any confirmation from the Land Office that the available area of the Land after a land acquisition exercise was carried out was still 6681.1822m, as represented and promised by D1/D2 under the supplemental agreements.

(d) The Plaintiff had since obtained confirmation from the Land Office *via* a letter dated 1.4.2014 that the **actual remaining area of the Land was only 2139.68m** after the land acquisition of 4541.5m by the Government.

(e) The Plaintiff is at all material times ready and willing to complete the SPA based on the adjusted purchase price of RM1,773,412.04 (based on RM77.00 x 23,031 .3252 square foot or equivalent to 2139.68m) (the Adjusted Purchase Price).

(f) Pursuant to the previous part payments from the Plaintiff, the balance purchase price for the Property which is due to D1 is RM735,861.24 (Balance Purchase Price). However, D1 which is at all material times a company exclusively owned and controlled by the husband and wife of D2 and D3, have refused to proceed with the SPA and insisted that the area of the land is 7177.5m without producing any document to substantiate their averment.

(g) Pursuant to clause 10 of the SPA, it is the responsibility of D1 to remove all encumbrances on the Land which is attributable to D1. This includes the Lienholder's Caveat which was entered against the Land by UOB on 12.1.2012.

9. Defendants contended that among others are: A

(a) The defendants are the registered proprietor of the Land had agreed to sell to the Plaintiff the Land at the agreed purchase price of RM5,948,857.53 at RM77.00 per square foot.

(b) The Land is described in the SPA (Recital 1) and the 1st Schedule and annexure of the SPA as measuring approximately 7177.5 square meters. B

(c) The Plaintiff who was represented by solicitors before and after the execution of the SPA was well aware of the title, land plan and final land survey plan and was fully appraised of the area of the land: it had knowingly and willingly entered into the SPA. C

(d) D1 had also entered into a tenancy agreement dated 6.7.2007 with the Plaintiff to let the Land at RM5,000.00 per month pending the transfer of the land to the Plaintiff. In the tenancy agreement the Land is described as measuring approximately 7177.5 square meters. The Plaintiff is in occupation of the Land until now. D

(e) Subsequently the 1st SA dated 2.6.2010 was entered into between Plaintiff and D1 which agreement was supplementary and ancillary to the SPA. By the 1st SA, the parties agreed that the Land at the time of execution of the 1st SA measures approximately 6681.1822 square meters in area and the Plaintiff purchased the same at the purchase price stated in the SPA. E

(f) By the 2nd SA dated 9.5.2011, the Plaintiff and D1 agreed that the purchase price of the Land measuring 6681.1822 as stated in the 1st SA shall be RM 5,537,550.80 being RM77.00 per square foot (6681.1822 square meters being equivalent to 71,916,249 square feet). F

(g) There is a restriction of interest in the title which states that the Land shall not be transferred or charged without the consent of the Jawatankuasa Kerja Tanah, Wilayah Persekutuan, Kuala Lumpur. Under the provisions of the SPA, the sale and purchase of the Land shall be conditional upon consent being obtained from the relevant authority. Consent to transfer and/or charge the Land was obtained on 11.11.2011. G

(h) It is a condition of the SPA that the sale and purchase should be completed by the Plaintiff paying up the balance purchase price within 3 months from the date of receipt of the consent by the purchaser's solicitors or within an extended one month period. H

(i) Despite extensions of time having been granted from March 2012 until August 2013, the Plaintiff had not been able to complete the purchase by paying up the balance purchase price stated in the 2nd SA. I

(j) The Defendants contend that the Plaintiff cannot rely on the letter dated 1.4.2014 from the Land Office as the contents of the letter are incorrect as the Final Survey Plan of the Land was not taken into consideration and the final title has not been issued which will be issued shortly. The Defendants' position is that the area of the Land was and still is 7177.5 square meters as stated in the SPA.

FINDING(S) OF THE LEARNED HIGH COURT JUDGE

1. Court held that, the plaintiff is entitle for the specific performance of the SPA. Court refer and took into consideration Land Survey Report by the PTG and confirmation report by the PTG on their letter dated 1.4.2014.

2. Clause 20 of the SPA expressly provides for adjustment of the purchase price in the event that there is a decrease or increase in the actual area as shown on the separate qualified titles.

3. It is finding of the court that pursuant to clause 20 of the SPA the purchase price has to be adjusted accordingly and the balance purchase price now due is RM 735,861.24.

4. Court further held that the corporate veil be lifted and D2 be held accountable. It is based on the evidence referred to by the Learned High Court Judge [HCJ] that it is clear that D2 was the directing mind/alter ego of D1 and was solely responsible for the misrepresentation made to the Plaintiff in respect of the area of the land.

5. Court of a view that the D1 is entitled to rental from September 2014 pursuant to the tenancy agreement entered into between the parties as the agreement is for payment of the agreed rental till perfection of the transfer of the land pursuant to the SPA which is yet to be perfected.

6. Defendants are not entitled to terminate the SPA between them since the plaintiff is entitled to claims for specific performance from the SPA.

7. For the quantum, Court only allowed the sum of RM 112,925.64 being additional stamp duty and RM 135,165.85 being extra legal fees.

8. Thus, Court held that the Plaintiff's claim is allowed and the Defendant's counterclaim is allowed in part. Defendants are appealing against whole of the decision of the Learned High Court Judge.

[71] At the hearing of the appeal, the relevant part of respondent's submission for this judgment was as follows:

46. What the Defendants attempted to do is to rewrite the contract and delay its completion until such time the Final Title is issued to reflect a bigger area so as to circumvent what was agreed in Clause 20. What was agreed in the SPA is for the Land to be paid and transferred according to the Qualified Title which was issued. That Qualified Title has temporary finality for whatever rights and interest which are being transferred to the transferee/Plaintiff - see subsections 215 (1), (3)(d) NLC:

Form, and effect generally, of transfer of land

215. (1) The transfer under this Act of an alienated land shall be effected by an instrument in Form 14A. … (3) The transferee of any alienated land shall hold the same subject to - …. (d) all other matters **then** appearing on, or referred to in, the register document of title. (emphasis added)

[72] It is trite that specific performance will only be allowed if the purchaser had fulfilled the terms of his bargain with precision and at all times was willing, ready and able to do so even at the stage of appeal where the purchaser is a party. In this case, the area of land was in dispute and there was a mechanism to resolve that dispute in the sale and purchase agreement (SPA) itself. If the area was not in dispute, it would have been a straight forward case for the plaintiff/purchaser to succeed on a claim for specific performance. At the appeal stage, the area of dispute was established by admitting fresh evidence by the appellant but the respondent had resisted to the appeal, thereby disentitling him to specific performance order.

[73] During the trial in the High Court, there was no clear documentary evidence to confirm the area of the land. However, on 4 August 2018 the appellant/defendant managed to secure an order to adduce fresh evidence before another coram of the Court of Appeal.

[74] Having looked at the fresh evidence, we are all in agreement that the area of land was indeed as claimed by the appellant in the SPA as well as in the trial.

[75] Once this issue is settled in the appellant's favour, the plaintiff's prayer on the facts of the case will collapse and the defendant's counterclaim must be allowed as provided in s. 69 of the Courts of Judicature Act 1964 (CJA 1964). Section 69 of CJA 1964 reads as follows:

Hearing of appeals

69. (1) Appeals to the Court of Appeal shall be by way of re-hearing, and in relation to such appeals the Court of Appeal shall have all the powers and duties, as to amendment or otherwise, of the High Court, together with full discretionary power to receive further evidence by oral examination in court, by affidavit, or by deposition taken before an examiner or commissioner.

A (2) The further evidence may be given without leave on interlocutory applications, or in any case as to matter which have occurred after the date of the decision from which the appeal is brought.

(3) Upon appeals from a judgment, after trial or hearing of any cause or matter upon the merits, the further evidence, save as to matters
B subsequent as aforesaid, shall be admitted on special grounds only, and not without leave of the Court of Appeal.

(4) The Court of Appeal may draw inferences of fact, and give any judgment, and make any order which ought to have been given or made, and make such further or other orders as the case requires.

C (5) The powers aforesaid may be exercised notwithstanding that the notice of appeal relates only to part of the decision, and the powers may also be exercised in favour of all or any of the respondents or parties although the respondents or parties have not appealed from or complained of the decision.

D **[76]** To put it mildly, there cannot be any equitable consideration in favour of the respondent/plaintiff in the appellate stage. In addition, the facts will show by circuitous logic that the respondent was attempting by a judicial process to deprive the full entitlement of the defendants' right of the full purchase price as agreed in the SPA. Even at appellate stage, the respondent
E was not able to concede to the area in dispute. It is clear that the land area was 7177.5 sq m and there could be an adjustment if it is found to be less or more. As such, specific performance being a discretionary and equitable relief ought not be granted to the respondent/plaintiff. In my view, the respondent did not come to the court with 'clean hands' at the trial stage as well as did not demonstrate 'clean hands' at the appellate stage.

F

[77] For reasons stated above, I will set aside the order of the High Court and dismiss the respondent's/plaintiff's claim and allow the appellants/ defendants' counterclaim with costs of RM70,000 for here and below subject to allocatur, taking into consideration the costs of RM50,000 was ordered in
G favour of the respondent in the High Court.

[78] I hereby order so with a note that the majority decision is in favour of the respondent.

H

I